Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

COMMENTS OF CENTURYLINK ON THE FURTHER INQUIRY INTO TWO UNDER-DEVELOPED ISSUES IN THE OPEN INTERNET PROCEEDING

In CenturyLink's view, the Public Notice requesting these comments — the *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding* — is remarkable, because it actually lends support to a the hands-off approach to the Internet and broadband service providers. Rather than supporting the sweeping imposition of legacy common carrier regulation — a drastic policy that the Commission now seems intent to impose on broadband service providers — the Public Notice shows the benefits of the hands-off approach that the Commission followed for decades. At the same time, the range of questions the Public Notice poses about specialized services and mobile wireless broadband, CenturyLink believes, highlight the folly of singling out one class of providers — wireline broadband service providers — for disparate treatment. That disparate treatment can serve only to reduce investment and deployment, undermining long-standing Congressional and Commission goals.

The Public Notice states that "[t]he discussion generated by the Commission's Open Internet proceeding appears to have narrowed disagreement on many of the key elements of the framework proposed in the NPRM …."[1] The Notice then lists five areas of "narrowed

[1] Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding, *Preserving the Open Internet*, GN Docket No. 09-191, Public Notice, DA 10-1667 (Sep 1, 2010).

disagreement," each of which actually is a feature of the *current* broadband environment without the Commission adopting any rules or changing any policy. Therefore, the Public Notice itself appears to support the conclusion asserted by a majority of the United States House of Representatives: that the Commission should continue the current, highly successful approach to broadband policy, rather than supporting the substantial increase in regulation proposed in the Notice of Proposed Rulemaking.

The current approach to broadband markets is working, and working very effectively, because broadband markets are disciplining network operators, and because the Commission's Title I ancillary jurisdiction approach has been effective. There have been only a very few instances of alleged harm. Those incidents have been quickly resolved, and they have shown the reality and the great effectiveness of broadband market discipline. Consequently, there is no credible reason, much less a compelling one, for the Commission to move away from its success and instead impose on broadband the outdated regulatory concepts from the late 1880s and early 1900s. The Notice of Proposed Rulemaking contemplates unnecessary, unbalanced, and unfair regulatory burdens on broadband, which would undermine the public interest. There is even less reason to extend such rules far beyond where they have ever been by regulating specialized services. Indeed, this would undo the very Computer Inquiry framework that protected specialized services from telecommunications regulation since the 1960s.

Neither broadband networks nor specialized services are natural monopolies. They should not be treated as such through Title II regulation and the related Open Internet proposals discussed in the Public Notice, all of which were created for the express purpose of constraining monopoly power. Indeed, heavy-handed Title II regulation would be out of sync with an evolving and dynamic specialized services environment. It would serve only to reduce

innovation and investment in broadband networks. Such a regulatory policy would inevitably lead to commoditization of specialized services, which would undermine competition and increase market concentration. Rather than act on unfounded fears that could become self-fulfilling prophesies, the Commission can and should continue to exercise its Title I authority over broadband and refrain from imposing any regulation of specialized services.

Finally, in all matters of Commission policy, it is essential that all providers of broadband services — including wireline and wireless —be treated the same. Regulatory treatment must be even-handed and technology neutral, particularly at the framework level (even if occasionally there may be differences in application to accommodate technological needs. The Commission should not compound regulatory mistakes by favoring one class of competitors over others.

I. THE INTERNET IS FREE AND OPEN, SO REGULATION WILL ONLY HARM INVESTMENT, INNOVATION, EMPLOYMENT, AND CONSUMERS.

The Public Notice asserts that disagreement has narrowed over various proposed broadband regulations. It simply is untrue, however, that there is any hint of consensus or broad agreement in favor of increased broadband regulation. There are strident calls from some who support such regulatory overreach, including those who would benefit from restricting how some broadband providers could otherwise better innovate and compete. Broadband markets do not need more regulation, and specialized services are in even less need of regulation. Given the growth in broadband services and the breadth of competition, there have been few instances of potential harm, certainly nothing sufficient to justify the radical and unhelpful policy change that the Notice of Proposed Rulemaking envisions.

The Commission's pro-market, de-regulatory approach to broadband has been in effect for the better part of a decade depending on the technology employed. Despite that long history,

the occasional proponents of greater regulation can point to astonishingly few examples of alleged harms. All of them were quickly resolved. It strains credibility to think that there would have been materially fewer instances of harm, or that they would have been resolved more quickly, had the Commission engaged in more regulation over broadband over the past decade. Accordingly, there is no evidence that the Commission must move hastily to impose additional regulation. There is no evidence that hasty action would produce any public interest benefits, much less sufficient benefits to offset the substantial public interest harm that would inexorably flow from increased regulation in the form of reduced innovation and investment.

The Public Notice lists five areas of "narrowed disagreement" about the proposal to increase broadband regulation set out in the NPRM. Each of these five areas of "narrowed disagreement" actually support maintaining current policies toward broadband, rather than adopting the new regulatory framework proposed in the NPRM.

First, broadband providers are not preventing users from sending or receiving the lawful content of their choice; nor are providers preventing them from using the lawful applications of their choice; nor are providers preventing the connection of non-harmful devices to the network. Second, broadband providers are transparent about their network management practices, more transparent, indeed, than they have ever been. Third, with respect to the handling of lawful traffic, users already have effective measures for anti-discrimination protection. Broadband providers are not discriminating but if one did, the Commission already has the authority to address the problem. Fourth, broadband providers are able to reasonably manage their networks, including through appropriate and tailored measures to reduce congestion or address traffic that is unwanted by users or harmful to the network. And, fifth, the Commission currently is effectively enforcing high-level rules of the road through case-by-case adjudication.

Accordingly, the Commission has already accomplished its broadband goals. It should step back and allow broadband markets to operate and grow. If any of the feared harms should occur, the Commission can address them through its Title I ancillary authority. If for any reason it cannot do so, then other antitrust and consumer protection rules provide more than ample protections. There are no significant examples where the feared conduct is going unchecked and, thus, no basis for the Commission to adopt rules that are likely to harm broadband markets, investment, innovation, and consumer welfare. Accordingly, this proceeding turns the first principles of public policy on their proverbial heads by moving to impose rules before any need has emerged, thereby imposing substantial public interest costs without any tangible benefits.

II. THERE IS NO BASIS FOR REGULATING SPECIALIZED SERVICES.

Notably, the questions in the Public Notice about specialized services all rest on sheer speculation rather than actual evidence. The Commission lists three ostensible concerns: "(1) Bypassing Open Internet Protections," "(2) Supplanting the Open Internet," and "(3) Anti-competitive Conduct."[2] In each instance, the concern is presented purely as a hypothetical without any supporting evidence. There is no such evidence. Instead, nearly all of the speculation about the supposed potential harms that could result from the provision of specialized services using facilities shared with broadband networks simply reflects either skepticism about markets[3] or a desire to alter market outcomes to favor one class of providers and/or customers at the expense of others.[4] This list of speculative fears shows that those

[2] Public Notice at 2-3.

[3] *See, e.g.,* CDT Comments at 46-49; Free Press Comments at 14; Independent Film & Television Alliance (IFTA) Comments at 18-19; Open Internet Coalition Comments at 71-73.

[4] *See, e.g.*, Netflix Comments at 9-10; CDT Comments at 46-48; Vonage Comments at 27; Google Comments at 75; Dish Network Reply Comments at 12; XO Communications Reply

interested parties who favor broadband regulation believe that such regulation will be harmful to broadband service providers, as they fear that broadband service providers will invest instead in specialized services. Thus, it is apparent from the Public Notice that the supporters of the Commission's Open Internet proposals recognize that those proposals will reduce investment and broadband deployment in direct conflict with the National Broadband Plan.

The Commission would be wise to resist calls to harm broadband investment and market evolution. Broadband markets are quite competitive today. USTelecom demonstrated the fact with extensive and compelling facts in a related proceeding.[5] Indeed, given the massive sunk cost investments needed to build and operate broadband networks regardless of technology, and given the huge ongoing investment needed even just to keep pace with growing bandwidth demand, competition between a relative handful of providers will generate just as much market discipline as competition among tens of providers in the kinds of markets with lower investment requirements that are typical in a modern economy. Given market discipline, Title II regulation in whole or in part is inappropriate for broadband Internet service. Title II regulation was developed to prevent potential abuses by natural monopoly providers of transportation and communications infrastructure and an era that has long past. Extending such misguided regulation to specialized services that are provided using broadband out of a fear that providers might somehow evade broadband regulation is an even greater mistake. It is a mistake that the Commission has studiously avoided for many decades.

Comments at 20-21.

[5] USTelecom Comments at 1-23, *Framework for Broadband Internet Service*, GN Docket No. 10-127.

Specialized services include a number of information and other services that have not been regulated by the Commission as telecommunications services. These include IPTV multichannel video distribution, virtual private networks, and applications that enable distance learning and telemedicine applications. These innovative new services do not offer general, user-directed Internet access but, rather use Internet Protocol to deliver specific functionalities that customers seek in *addition* to rather than instead of using Internet access service. To regulate specialized services would be the same as to regulate application providers that happen to deliver their services over the Internet. In this way, the notion of regulating specialized services would by an even greater extension of Commission jurisdiction and imposition of regulatory burdens than contemplated by the Chairman's Third Way proposal.

The Commission does not have the authority to adopt most of the policy approaches described in the Public Notice. Nor should it want to claim such authority, given that they are based on legacy Title II concepts that in turn rest on an outdated concept of monopoly common carriers and rate regulation that plainly are not applicable today. To rationalize such a policy, the Commission would have to reverse decades of clear policy and precedent by classifying broadband services as a Title II service for the first time despite clear statutory guidance to the contrary. Moreover, the Commission would effectively have no choice but to adopt rate regulation to replicate the historical foundation for requirements such as a stand-alone service offer requirement. Even then, the Commission likely still would not have the authority to *require* broadband providers to deploy networks and offer specified services pursuant to specified terms and conditions, as suggested in policy approach "F" listed in the Public Notice. Finally, even if that hurdle could be cleared, there is no basis in the Communications Act for *prohibiting* broadband service providers from offering specialized services as they deem

appropriate, particularly over separate facilities as suggested in policy approach "E". This would be tantamount to preventing common carriers from building and operating private carriage networks, which appropriately is beyond the Commission's authority.

Not only is regulation of specialized services inappropriate, it is also certain to be affirmatively harmful for consumers. Regulation discourages innovation and investment, and by limiting competitive alternatives, it is ill-suited to today's ever more competitive markets. In fact, heavy-handed regulation is likely to commoditize specialized services and lead to increased market concentration, as providers would be unable to develop new and different services, and would be unable recover the cost of differentiating investments.[6] That commoditization would stifle competition, deter investment, and add yet another layer of regulatory complexity and disparity for present and future providers of broadband and specialized services.

There must be regulatory balance across the broadband ecosystem. Any rules must not favor producers over distributors, as would happen through regulation of specialized services. In the highly competitive, rapidly evolving broadband ecosystem, the massive network investments necessary to deliver the world-class broadband services our country needs would not be met if lopsided compelled network providers to bear most of the risk while excluding them from most of the potential benefit.

III. ALL BROADBAND NETWORKS SHOULD BE TREATED THE SAME.

The Public Notice indicates that the Commission is contemplating lesser restrictions for mobile wireless broadband, perhaps because some such providers have introduced usage pricing

[6] E.g., George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak, *Network Neutrality and Industry Structure*, Phoenix Center Policy Paper 24 (April 2006), available at http://phoenix-center.org/pcpp/PCPP24Final.pdf.

plans for at least some of their customers. The Commission has long recognized, however, that in any regulatory regime there must be competitive neutrality. Parity between competitors and networks is essential; all broadband providers must play by the same rules as a matter of basic fairness, economic rationality, and equity among consumers. This is particularly true at the level of establishing core principles, even if those principles may sometimes be applied somewhat differently to reflect technological factors.

The core principles and legal obligations must be the same for all providers or else the Commission will be altering, and ultimately harming, competition, investment and innovation. Disparity in legal rights and obligations would inevitably skew the market away from the most efficient and productive allocation of resources. Imposing a regulatory regime that disfavors one industry sector — *i.e.,* wireline broadband — would harm all consumers generally. It would probably also harm mobile and fixed wireless customers specifically by reducing backhaul investment, especially in rural areas.

Wireless providers argue that the Commission can somehow treat wireless broadband differently from wireline broadband, hoping to preserve Title I ancillary treatment even if the Commission inadvisably were to impose greater regulation on wireline broadband services than they face today. The Commission cannot reasonably or responsibly take such an approach, however. Not only would it be bad policy and inconsistent with long-standing Commission precedent to treat competitors differently, but it would also be inherently arbitrary to do so, particularly if the Commission were to adopt the so-called Third Way.

As the Commission explained in the Framework for Broadband Internet Service NOI, the Third Way is modeled on the regulatory approach to wireless voice services. Wireless voice services are subject to Title II regulation through Section 332 of the Communications Act, except

to the degree the Commission has determined to forbear from such common carrier regulation.[7] It would be legally unsupportable (and quite ironic) to treat wireline broadband services the same as wireless voice services, while simultaneously affording wireless broadband services more favorable regulatory treatment. The Commission has already concluded that wireline broadband and wireless broadband services share similar characteristics and should be treated the same.[8] Indeed, rural wireline broadband networks exhibit the same scarcity and congestion problems that wireless networks face due to the cost of deployment and limited revenue opportunities. Accordingly, wireless and wireline broadband networks must be treated the same.

Respectfully submitted,

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[7] 47 U.S.C. § 332.

[8] *E.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-10, 5912-14, ¶ ¶ 19-26, 29-33 (2007).